

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
-VS-)	No. 20-CR-276-GKF
)	
SHANNON JAMES KEPLER,)	
)	
Defendant.)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE
APRIL 12, 2021

A P P E A R A N C E S

Ross Lenhardt and Sean Taylor, Assistant U.S. Attorney, 110 West Seventh Street, Suite 300, Tulsa, Oklahoma, 74119, attorney on behalf of the Plaintiff;

Stanley D. Monroe, Attorney at Law, Stanley D. Monroe & Associates, 15 West 6th Street, Suite 2112, Tulsa, Oklahoma, 74119, attorney on behalf of the Defendant.

REPORTED BY: **BRIAN P. NEIL, RMR-CRR**
United States Court Reporter

Brian P. Neil, RMR-CRR
U.S. District Court - NDOK

Monday, April 12, 2021

* * * * *

THE COURT: Very well. All right. We have a number of items to deal with, the motion to suppress, the motion to continue. So what makes most sense to the parties here to address first? And I have no preference.

MR. LENHARDT: I don't think it really matters too much, Judge. I can tell you that the government and the defense have discussed what witnesses, if any, may be necessary for the suppression motion. I think at least from our perspective, that would appear that there are no witnesses that would need to be necessary, that if Your Honor finds it acceptable, that we offer into evidence the exhibits that the government provided to our response, that that will be all the testimony that's necessary.

If the court feels differently, Detective Kennedy is outside, he is prepared to testify in this regard. But at least when Mr. Monroe and I discussed this matter, we didn't see the need for any further testimony or evidence. It just appears honestly between the two of us that this is a coin flip where you have to make the decision. So --

THE COURT: I don't see the need for additional testimony, particularly if counsel do not. And since we raised the motion to suppress first, let's just jump into that.

Does the prosecution wish to offer these documents into

1 evi dence?

2 MR. LENHARDT: I would, Your Honor. They are
3 Government's Exhibits 1 through 4, and I believe that they
4 would be admitted without any objection from the defense.

5 MR. MONROE: That's correct, Your Honor. We did
6 discuss this before we came to court today, and both sides
7 agree that I think you can make a decision just based upon
8 those exhibits. But if there's any additional questions, we
9 can bring Detective Kennedy in here.

10 THE COURT: All right. Government's Exhibits 1
11 through 4 are admitted without objection.

12 I do ask here before we start, it does not appear that
13 Mr. Monroe seeks to suppress the second statement by
14 Mr. Kepler, that "he died"; correct?

15 MR. MONROE: Correct.

16 THE COURT: All right. So we're simply seeking to
17 suppress the statement that he "had a couple of drinks
18 earlier"; correct?

19 MR. MONROE: That was preceded by a question.

20 THE COURT: Yes.

21 MR. MONROE: Yes. That was preceded by a question.
22 The other comment was preceded by a statement.

23 THE COURT: And by saying "the other comment" --

24 MR. MONROE: That "he died" --

25 THE COURT: Yes.

1 MR. MONROE: -- I think was actually a question
2 rather than a statement, but I think the testimony would show
3 that Detective Kennedy informed Mr. Kepler that Mr. Lake had
4 died.

5 THE COURT: Correct. There was no inquiry there.
6 It was simply a response to his statement.

7 MR. MONROE: Yeah, right.

8 THE COURT: Yeah, I follow.

9 MR. MONROE: The other question, though, "have you
10 had any anything to drink," was a question which was asked
11 after Mr. Kepler had invoked his right to counsel, very clearly
12 invoked his right to counsel.

13 THE COURT: All right. And as I understand it, the
14 government concedes that Mr. Kepler had invoked his *Miranda*
15 rights prior to that statement; correct?

16 MR. LENHARDT: Yes, sir.

17 THE COURT: All right. And the court is prepared to
18 rule. Are there any other arguments to be made here?

19 MR. LENHARDT: Just a very brief one from the
20 government, Judge.

21 Almost every time I come to federal court --

22 THE COURT: Oh, I'm sorry. Would you mind coming up
23 to the podium? And you don't need the mask there.

24 MR. LENHARDT: I've already had my distemper shots,
25 I like most people here, so I think I ought to be good to go.

1 THE COURT: And I know Mr. Monroe did because I was
2 there when he had his shot. So --

3 MR. LENHARDT: My very brief argument is this.

4 Almost every time that I go into federal court a judge
5 asks a defendant, "Have you had any drugs or alcohol in the
6 last 48 hours?" The reason that you ask him those questions is
7 to determine whether he is competent to answer any further
8 questions that you might have of him. When you do that,
9 generally the defendant is in custody. So the question becomes
10 should you give the defendant *Miranda* rights every time? And
11 the answer is clearly, no, that you don't need to do that.
12 Because your inquiry is not for the purpose of determining if
13 he did something illegal, it is for the same purpose that
14 Detective Kennedy was essentially asking. This was not a
15 question designed or intended to be incriminatory.

16 THE COURT: But the purposes are entirely different,
17 aren't they? For my purposes, I'm trying to find out whether
18 they're competent to proceed at that hearing. Isn't it
19 reasonably characterized in the context in which officer -- or
20 Mr. Kepler was involved, wasn't it reasonably likely to elicit
21 an incriminating response?

22 In my questioning of criminal defendants, I'm not going
23 to have them charged if they've consumed alcoholic beverages.
24 I'm simply going to continue the hearing.

25 MR. LENHARDT: The question isn't the ultimate use

1 of what the defendant says. The question is, what the
2 intention was for asking the question. When you ask it, the
3 defendant might say, "no, I haven't had anything to drink." It
4 may turn out later that the defendant did have something to
5 drink and he could be charged potentially by some other federal
6 agency with lying to the court, perjury, or 1001 for lying to
7 federal officers. So the question isn't whether the
8 defendant's statement ultimately may have been inculpatory.
9 I'll give you an example.

10 If I was to ask a defendant when he's arrested, "what's
11 your name, what's your date of birth, where do you live," when
12 you ask those, the questions aren't intended to show something
13 incriminatory. They're intended to find out background
14 information that's generally required and necessary in almost
15 every case. The fact that police later go to that same house
16 and find a dead body in the house may mean that the statement
17 is now inculpatory, but the question isn't whether it
18 ultimately is used in the prosecution. The question is whether
19 at the time that it was asked if it was intended for that
20 purpose.

21 If Detective Kennedy intended to ask questions about
22 the defendant's performance that particular night, the last
23 question that he would really need to know is, did you have any
24 alcohol? The first thing he would want to know is, did you
25 kill Jeremy Lake; and the second would be, where did you put

1 the gun; and the third is, where is your vehicle that you used
2 during the course of that incident?

3 You saw the video. You've seen the reports. They
4 don't ask any of those questions. None of these questions were
5 intended to be incriminatory. He had to find out if the
6 defendant was competent to give a statement, or in the
7 alternative, whether he was competent to say, I don't want to
8 give a statement.

9 THE COURT: But am I inquiring here under the Tenth
10 Circuit standard, which is an objective one, into the
11 lieutenant's subjective intent in asking of the question?
12 Isn't the inquiry objective as to whether it's reasonably
13 likely to elicit an incriminating response? And then secondly,
14 it goes into because of the response here, we don't know
15 whether the alcohol was consumed before the shooting or after.
16 I mean, it's reasonably likely that it was consumed afterwards
17 as Mr. Kepler was speaking with his lawyer and speaking with
18 his wife.

19 Are you suggesting that the consumption of alcohol
20 afterward is somehow incriminating of Mr. Kepler because he
21 needed it to calm his nerves? Wouldn't someone naturally take
22 a shot of whiskey or whatever regardless of whether or not he
23 perceived himself to be guilty?

24 MR. LENHARDT: So those are all very good questions
25 and I think I can answer all of them for you.

1 So the statement itself doesn't tell us exactly when he
2 had that alcohol. So it would be important, if you're a
3 federal prosecutor or a federal agent, to see if you can find
4 that out. We did. We dug into that information. We know that
5 his mother-in-law had contact with him after he worked that
6 particular day, for example.

7 **THE COURT:** That lived next door?

8 **MR. LENHARDT:** Yes. She lived right next door,
9 correct.

10 And so we interviewed her and she told us essentially
11 that Mr. Kepler was helping her out that particular day after
12 work and that he did not exhibit any signs of having consumed
13 any alcohol, that he didn't smell like alcohol, that he didn't
14 look to be intoxicated, and we know that the shooting was after
15 the contact with the mother-in-law. And so you have to try to
16 figure out, like you said, is it that he was just calming his
17 nerves afterwards? That would be a rational thing to do, as
18 you said.

19 So do we know if he had any alcohol before the
20 shooting? And the answer is that, yes, the government does
21 know and we have evidence of that. In part, the evidence comes
22 from his own wife and will come from his own attorney at the
23 time as well. Both of them were interviewed and both of them
24 gave, to some extent, some information in that regard.
25 Essentially they would say that he wasn't drinking when he was

1 with them and that he met them at the Motel 6 near his house in
2 Broken Arrow essentially immediately after the shooting. We
3 also know from the vehicle when the vehicle was seized that
4 there was no, for example, empty bottles of liquor or anything
5 like that in the vehicle itself.

6 So all the evidence that the government has is that
7 Mr. Kepler went to work that day, that there were things that
8 he saw and did during the course of his employment that led him
9 to conclude that Jeremey Lake could be found at 202 North
10 Maybelle, that after he helped his mother-in-law, he then went
11 to the address, 202 North Maybelle, shot and killed Jeremey
12 Lake and shot at his own daughter. And we know from the other
13 witnesses that his drinking had to occur during the time frame
14 of the shooting. There's no evidence that he had anything to
15 drink afterwards --

16 THE COURT: What does that mean, "during the time
17 frame of the shooting"?

18 MR. LENHARDT: Well, there's no way for me to know
19 without interviewing the defendant particularly if, for
20 example, he was sitting at the scene drinking while he was
21 sitting there waiting to see Jeremey Lake, if he had it before
22 he got there, or if he had it on the route between the shooting
23 and where he ultimately met his wife and his attorney. All we
24 know is this particular piece of evidence, that in the vehicle
25 there was no evidence to show that he was drinking at that

1 point so there's no bottle of alcohol in the car, for example.

2 And so all the evidence that we have indicates that his
3 particular activities that day progressed thusly: That he went
4 to work, that he used information to try to figure out where
5 Jeremey Lake was, that he went and helped his mother-in-law
6 out, that after that he had something to drink, then he went to
7 the scene of this incident, and from there progressed to Broken
8 Arrow outside the Motel 6.

9 THE COURT: Well, like a good prosecutor, you're
10 focusing on the facts. But, again, isn't my inquiry an
11 objective one regardless of the inquiring officer's intent?
12 Don't I have to determine whether or not it was reasonably
13 likely to elicit an incriminating response, particularly in
14 light of what you just told me?

15 MR. LENHARDT: Yes. So I believe that you have the
16 Tenth Circuit law accurate in what you have to try to make a
17 determination of. I submit to you that there's no evidence
18 that the question objectively was intended to elicit any
19 incriminating information. He was trying to do the same thing
20 that you were doing: Is this guy competent to do what I'm
21 about to ask him to do? In your case, it's, for example, plead
22 guilty, or go to sentencing. In Detective Kennedy's case, it
23 was is he competent to waive or invoke his *Miranda* rights? And
24 ultimately, we know that that information is going to be
25 necessary when he's taken to jail as well. So this is

1 information that is gathered by Detective Kennedy every time he
2 interviews someone -- you can see that from the reports -- and
3 there's nothing in any of the other questions that he asks that
4 indicate it's to the contrary.

5 THE COURT: Thank you.

6 MR. LENHARDT: You're welcome.

7 MR. MONROE: Your Honor, I appreciate Mr. Lenhardt's
8 advocacy but I think he's overlooking a glaring point that you
9 raised. He's assumed a series of events that occurred but he
10 doesn't have any information to fill in some of the time gaps.

11 Yes, we have Mr. Kepler at work, having him coming home
12 from work, helping his mother-in-law move some furniture from
13 down the street to his house, he returned to his home, and then
14 sometime later -- an hour, two hours maybe -- he goes to the
15 scene, 202 North Maybelle, the incident occurs, he leaves
16 there, calls his wife who meets him, and an attorney's called.
17 But he was alone in the vehicle after the incident that
18 occurred around 9:15, 9:17, something like that, until his wife
19 met him in Broken Arrow in the parking lot.

20 THE COURT: When did he get off work?

21 MR. MONROE: He got off work at 5:00, I believe. Is
22 that correct, 5:00? 5:00.

23 Now, the reason -- the potential answer to the
24 question, it's more than Detective Kennedy just trying to
25 verify whether he could appropriately invoke his rights. He'd

1 already done that. You have Mr. Talley -- Officer Talley's
2 report who encountered Mr. O'Carroll, the attorney, and
3 Mr. Kepler in the parking lot of the police courts building
4 before they went inside, and Mr. O'Carroll clearly told Officer
5 Talley that Mr. Kepler was invoking his right to counsel and
6 Mr. Kepler himself invoked his right to counsel when he saw
7 Detective Kennedy. So there's really no reason why Kennedy
8 would be asking him anything. He knew his name. They worked
9 together. They knew one another.

10 And the reason the testimony's potentially critical is
11 because one of the witnesses, Michael Hamilton, claimed in his
12 interview that had occurred before Mr. Kepler's interview that
13 it appeared to him that the man in the Suburban appeared to be
14 under the influence. He described him as stumbling, possibly
15 drunk.

16 So that, coupled with the fact that potentially an
17 admission to driving under the influence, which I understand we
18 don't have here, but there's a myriad of ways that that
19 question was specifically designed to elicit something
20 incriminating.

21 **THE COURT:** Are you saying that definitively the
22 police had the statement of Hamilton prior to asking the
23 question of Kepler?

24 **MR. MONROE:** That's my belief. I don't have
25 Hamilton's statement right at my fingertips right now. But my

1 recollection is, that he was interviewed briefly at the scene,
2 more detailed in the detective division, ironically where the
3 trash-can gun was found, and then Kepler and his attorney
4 turned -- or turned Mr. Kepler in shortly before midnight. So
5 there was about a two-and-a-half-hour gap between the time of
6 the incident and the time that Mr. Kepler appeared in the
7 police parking garage there.

8 So the right to counsel was invoked, *Miranda* was
9 invoked, with Officer Talley. That information was
10 disseminated to Detective Kennedy. There was no reason
11 whatsoever for Detective Kennedy to ask any questions, you
12 know, just none, no reason. And because Mr. Kepler had invoked
13 that right --

14 THE COURT: But under an objective analysis, I don't
15 have to inquire as to what his subjective reason was.

16 MR. MONROE: No, you do not. I don't think you do,
17 sir. I think he knew that he had invoked his right to counsel,
18 no questions. He shouldn't ask another question.

19 THE COURT: Well, I mean, he is entitled -- as the
20 briefing points out, he is entitled to ask routine booking
21 questions; correct?

22 MR. MONROE: Routine booking questions, yes, sir.
23 Yes, sir.

24 Now, you know, to the extent that David Moss jail would
25 have a policy of making those inquiries with respect to inmates

1 coming into the jail, that's another matter. We're just
2 talking about the question by Detective Kennedy and the answer
3 by Mr. Kepler.

4 THE COURT: Thank you.

5 MR. MONROE: Thank you.

6 *(Discussion held off the record)*

7 THE COURT: All right. The court is prepared to
8 rule. We will enter a written order on this later.

9 The Tenth Circuit has held that the inquiry as to
10 whether or not an officer's question or comment was "reasonably
11 likely to elicit an incriminating response" is an objective one
12 and the court must focus on the perceptions of a reasonable
13 person in the suspect's position rather than the intent of the
14 investigating officer. And that's found in *United States v.*
15 *Cash*, 733 F.3d 1264, at 1277, quoting *United States v. Rambo*,
16 365 F.3d 906, at 909 (10th Cir. 2004).

17 The U.S. Supreme Court has recognized that a -- or
18 recognized a routine booking question exception which exempts
19 from *Miranda*'s coverage questions to secure the biographical
20 data necessary to complete booking or pretrial services.
21 However, the plurality recognized that the police may not ask
22 questions even during booking that are designed to elicit
23 incriminatory admissions.

24 The detective's inquiry as to whether Mr. Kepler had
25 anything to drink does not fall within the routine booking

1 question exception to the *Miranda* requirement. The question
2 was not directed to general biographical data necessary to
3 complete the booking process.

4 The government points out that the form which Detective
5 Kennedy relied upon asks whether the inmate appears to be under
6 the influence of drugs or alcohol. Significantly, however,
7 that inquiry appears under the heading "observations" rather
8 than "questions." This suggests that the officer need not ask
9 the suspect but may complete the form based on his or her own
10 observations.

11 And I will say that Officer Kepler was acting a bit
12 strange during that interview but that's not part of the
13 inquiry here.

14 The government directs the court to the Ninth Circuit's
15 decision in *United States v. Washington*, 462 F.3d 1124 (9th
16 Cir. 2006). In that case, the court concluded that questioning
17 regarding an individual's gang moniker was a routine booking
18 question because it went to the person's identity. The court
19 reasoned that asking about a nickname, even if it's for
20 identification purposes, is no different from simply asking for
21 a suspect's name. But here, Detective Kennedy's question was
22 clearly unrelated to Mr. Kepler's identity.

23 The court concludes that a reasonable person in the
24 suspect's position, rather than focusing on the intent of the
25 investigating officer, under that standard, the court concludes

1 that the officer's question was reasonably likely to elicit an
2 inculpatory response and the motion to suppress is granted.

3 All right. Let's move to the motion to continue. I
4 don't know that a written response is necessary. Mr. Lenhardt.

5 MR. LENHARDT: Sorry. I keep going to the wrong
6 place.

7 THE COURT: Yeah.

8 MR. LENHARDT: I agree that I don't think a written
9 response is necessary and I don't even think much of an oral
10 argument is necessary here.

11 It appears that the continuance is basically based upon
12 the defense's concern that other cases may, in fact -- may
13 impact this particular case. That appears to be something that
14 Your Honor can take care of during the voir dire of different
15 potential jurors in this particular matter so I don't see that
16 a continuance is necessary. That's the short answer.

17 THE COURT: All right. Anything to add to the brief
18 that was filed?

19 MR. MONROE: No, sir. Well, just a response to
20 Mr. Lenhardt's comments.

21 We also pointed out that Mr. Kepler's matter has had a
22 significant amount of pretrial publicity throughout the state
23 court proceedings and even up to the current time. But that,
24 again, is an issue that the court could take care of either
25 with a jury questionnaire or voir dire. But it's the extensive

1 media coverage of the matter in Minneapolis. George Floyd
2 died. Officer Chauvin was standing trial. That trial is being
3 televised. Potentially some of the jurors may be watching that
4 and the thought of -- you know, there's talking heads on all
5 the time talking about racism and black -- or white officers'
6 inappropriate use of force against black citizens, and even
7 though that really may not be a part of this trial. But
8 nevertheless, a police officer accused of killing a citizen.
9 It just seems like there's just an awful lot in the media that
10 might be consuming the attention of some of the jurors. And so
11 to avoid that prejudice, we'd ask the court to consider
12 continuing this case about 60 days.

13 And we also pointed out there's a -- the COVID issue is
14 still a bit of a concern, certainly not as much as it was six
15 months ago. But a number of citizens have yet to be
16 vaccinated, and I always wonder whether or not jurors may feel
17 a little uncomfortable being in a situation in a courtroom next
18 to others. So that's another consideration as well. Thank
19 you.

20 THE COURT: Thank you. Section 3161(h)(7)(A) of the
21 Speedy Trial Act permits a federal district court to exclude
22 any period of delay resulting from a continuance if the judge
23 granted such continuance on the basis of his findings that the
24 ends of justice served by taking such action outweigh the best
25 interest of the public and the defendant in a speedy trial.

1 Pursuant to the Speedy Trial Act, the court shall
2 consider whether the failure to grant such a continuance in the
3 proceeding would be likely to make a continuation of such
4 proceeding impossible or result in a miscarriage of justice.

5 Mr. Monroe argues that in light of the media exposure
6 associated with Mr. Kepler's case, not to mention the likely
7 spillover from the trial in Minnesota, the prejudice may be too
8 much to overcome at this time. Mr. Monroe does not direct the
9 court to any evidence of actual prejudice, but rather he
10 implicitly asks the court to presume that Mr. Kepler will be
11 prejudiced by an April trial.

12 For the court to presume that inflammatory pretrial
13 publicity so permeated the community as to render impossible
14 the seating of an impartial jury, the court must find that the
15 publicity, in essence, displaced the judicial process thereby
16 denying the defendant his constitutional right to a fair trial.
17 And that's from *United States v. McVay*, 153 F.3d 1166, at page
18 1181 (10th Cir. 1998).

19 From that same case, the court stated that the bar
20 facing the defendant wishing to prove presumed prejudice from
21 pretrial publicity is extremely high. And that's at page 1182.

22 The defendant must establish that an irrepressibly
23 hostile attitude pervaded the communities. That's from
24 *Stafford v. Saffle*, S-a-f-f-l-e, 34 F.3d 1557, at 1566 (10th
25 Cir. 1994). The law does not require that jurors be ignorant

1 of the controversy, only that they be impartial. That's also
2 from *Stafford* at page 1566.

3 In support of the motion, Mr. Monroe provides the court
4 a four-page list of headlines related to Mr. Kepler's case.
5 Mr. Monroe does not provide the court the content of those
6 articles. Based on the headlines and source citations alone,
7 it appears that the majority of the articles are factual
8 reports rather than editorials. Based on the evidence
9 presented, there is no suggestion of a circus atmosphere or
10 lynch mob mentality or of any other community-wide rush to
11 judgment that infected other trials that have been set aside
12 For lack of an impartial jury. Again, from *Stafford* at page
13 1566.

14 To the extent that Mr. Kepler relies on the ongoing
15 Chauvin trial, he offers no evidence in that regard. Although
16 the case has received nationwide attention, Mr. Kepler fails to
17 show that it has resulted in an irrepressibly hostile attitude
18 that pervades the community. This is particularly true in
19 light of the factual differences between the Chauvin case and
20 this case. Mr. Chauvin was on duty at the time of George
21 Floyd's death and was on the scene in his capacity as a police
22 officer. In contrast, Mr. Kepler was off-duty at the time of
23 the shooting and acting in his personal capacity. The court
24 acknowledges Mr. Kepler's prior employment as a police officer,
25 but the defendant has failed to show how the trial of another

1 former police officer in another state related to different
2 factual circumstances will result in the displacement of the
3 judicial process.

4 Further, to ensure the seating of an impartial jury,
5 the court intends to conduct a thorough voir dire. In
6 addition, the court will entertain arguments with regard to
7 juror questionnaires and allowing counsel to inquire in voir
8 dire.

9 In addition to media coverage, Mr. Monroe argues that a
10 sharp increase of reported positive COVID tests in several
11 states warrants a continuance; however, Mr. Monroe has not
12 shown that Oklahoma is experiencing a surge. Further, the
13 court notes that Oklahoma's COVID cases have decreased
14 significantly over the past few months while the percentage of
15 the population that has been vaccinated continues to climb.
16 For this reason, pursuant to General Order 21-10, this court
17 has made the decision that it will conduct criminal jury trials
18 in April of 2021.

19 Finally, the court notes that the Speedy Trial Act was
20 intended not only to protect the interests of defendants, but
21 was also designed with the public interest firmly in mind.
22 That's from *United States v. Toombs*, 574 F.3d 1262, at page
23 1273 (10th Cir. 2009).

24 The public has a strong interest in resolution of
25 Mr. Kepler's case. Mr. Kepler has been tried four times in

1 state court. The court will not delay providing the parties,
2 their families, and the public some measure of finality by
3 delaying this fifth trial. For these reasons, Defendant
4 Kepler's motion for a continuance of trial at docket No. 81
5 will be denied.

6 Now, we have a number of other issues here.
7 Mr. Lenhardt, what else does the government believe we should
8 address at today's pretrial?

9 MR. LENHARDT: I just had a couple of generic
10 questions about the trial itself, Judge.

11 THE COURT: Yes, sir.

12 MR. LENHARDT: We know that we were fifth up and now
13 we're first up, and so I just wanted to make sure that what I
14 heard from other prosecutors was going to be the case here,
15 like I heard it was going to if they had been first or second
16 or third.

17 It was my understanding that the court had considered
18 for the first day of the trial, on April 19th itself, ordering
19 that the jury would be selected and assuming that time would be
20 still available for the court to give your preliminary
21 instructions to the jury and for the counsel to open to the
22 jury.

23 It was also my understanding that witnesses were
24 scheduled to start the next morning, and I hope you might be
25 able to consider that here. It makes my life a lot easier if I

1 know the choreography of when we're going to start with
2 witnesses and it helps with all the other witnesses that sort
3 of follow that.

4 THE COURT: That would be my intention. And as you
5 know, this court will be utilized by Judge Eagan -- or this
6 courtroom. We will try this case in the Boulder courthouse,
7 third floor. It's my hope that because that courtroom is so
8 large, we'll be able to provide adequate spacing for the jurors
9 in the jury box, we'll probably put out seats in front of the
10 box there to further space out jurors, and we'll be able to, I
11 believe -- or at least I'm told -- bring in all of the
12 prospective panel in that large courtroom and we'll have seats
13 numbered for them with adequate spacing in the gallery.

14 MR. LENHARDT: So I did go to visit the Boulder
15 courthouse. The first thing you have to say is, wow, is it
16 beautiful. The building is beautiful inside. The courtroom is
17 staggering.

18 Is it the court's intention to have the jurors
19 essentially in the jury box or are they going to be in sort of
20 the gallery as well?

21 THE COURT: Well, the actual jurors --

22 MR. LENHARDT: Yes.

23 THE COURT: -- once we select them?

24 MR. LENHARDT: Yes, once selected.

25 THE COURT: It's my intention to spread them out in

1 the box and then have a line of jurors in seats in front as
2 well, and I think we can get that many jurors in. It would be
3 my intention to seat 14. I take it this is going to last the
4 week; correct?

5 MR. LENHARDT: Yes, sir. The government's estimate,
6 from the time we begin to select the jury until they go out for
7 deliberations, is five trial days for that time frame, Judge.

8 THE COURT: All right.

9 MR. LENHARDT: So that sort of brings up a couple of
10 my other sort of random questions.

11 Having visited that courtroom -- it's cavernous is
12 perhaps a good way to put it -- it makes it a bit more
13 difficult to make sure that all of the jurors hear what the
14 witnesses have to say. So my hope is that you might find it
15 acceptable for me to have a podium sort of at the end of the
16 jury box so that when I ask questions I know that if I can hear
17 the witness, that all the jurors can hear them as well.

18 Is that acceptable to the court as well, Your Honor?

19 THE COURT: I haven't really thought about that. Of
20 course, the problem with that is it becomes a tennis match,
21 right? Because you would be at the far end near the gallery
22 and they would be swinging back from you to the other side of
23 the courtroom where the witness stand is. I don't know that
24 that's necessary.

25 My recollection is that with all of the electronic

1 gadgetry that we now have in the courtrooms, the tether for
2 that podium is probably not long enough to go that far.

3 MR. LENHARDT: I agree, Your Honor. But what I
4 found was that there are microphones on the prosecution table
5 that will reach to that area, if that other podium that's sort
6 of hidden in the back part of the courtroom there is just moved
7 out there.

8 So the other reason for my request to have the podium
9 in that particular location of when the counsel asks their
10 questions is sort of this one, Judge, and I'm going to move to
11 help you see what I'm talking about.

12 If I move to this podium instead, if there was a
13 witness on the jury's -- in the witness box at this particular
14 time, as they're speaking to me the person right behind me is
15 the defendant. We know that some of the people who are going
16 to be witnesses in this particular case were eyewitnesses to
17 the death of their brother and also the defendant's daughter.

18 My experience in 32 years of prosecuting people is that
19 it is very difficult for them to pay attention when they have
20 to see the defendant directly behind me when I ask every
21 question. They get very distracted. They often look at
22 defendants behind me. So I would prefer that they not have to
23 stare through me to the defendant during some of my questions.
24 Obviously, that doesn't apply to the gross majority of my
25 witnesses. But if I'm able to move the podium, that will help

1 essential with both issues, making sure that the jurors can
2 hear us and making sure that the witnesses aren't distracted by
3 the defendant being directly behind me.

4 THE COURT: Well, you appeal to my sensibilities as
5 a former state judge, where my only rule was that you couldn't
6 stand on counsel table and ask questions. I kind of enjoyed
7 the Clarence Darrow moving about the courtroom business, but
8 back then lawyers could project better than they can these
9 days. Today we need amplification and, of course, your voices
10 have to be preserved for eternity on this high-priced recording
11 equipment purchased for us by the American taxpayers.

12 But let me first ask my courtroom deputy, give me a
13 second and I'll find out the logistics here, and then I'll ask
14 Mr. Monroe as to his view here.

15 *(Discussion held off the record)*

16 THE COURT: Mr. Monroe, you're familiar with the
17 layout in that cavernous courtroom. What are your thoughts
18 here?

19 MR. MONROE: To be honest, Your Honor, I don't
20 believe I've appeared -- I've been in that courtroom since
21 Judge Ellison was with us. That was his courtroom. I've been
22 in the second floor courtroom a number of times. But I just --
23 I was just trying to think in my mind how it's configured.

24 THE COURT: Well, we changed the configuration. You
25 were at the last Inns of Court meeting that we had -- it's been

1 years ago --

2 MR. MONROE: Right.

3 THE COURT: -- when Judge West spoke. It was kind
4 of a session honoring Judge Ellison.

5 MR. MONROE: That's right, I was there. I'd
6 forgotten about that. It was pretty packed, as I remember, and
7 I still can't -- I still can't get an image in my mind where
8 the podium was.

9 THE COURT: Right. Well, the podium -- I don't
10 think the location of the podium has changed much. It's
11 directly --

12 MR. MONROE: Okay.

13 THE COURT: -- in front of the bench.

14 MR. MONROE: All right.

15 THE COURT: We've moved the jury box to the west
16 side of the courtroom. It's expanded.

17 MR. MONROE: Okay.

18 THE COURT: Much bigger than it was before. We've
19 expanded the area for the courtroom deputy and the court
20 reporter. The witness stand is on the west side now close to
21 the jury box.

22 In my mind's eye -- I may have to go over and take a
23 look -- I think we can satisfy Mr. Lenhardt's concern somewhat
24 because I believe that the tether on that podium is such that
25 the podium can be moved closer to the jury box so that the

1 witnesses don't have to view the defendant directly in that
2 line of sight.

3 MR. MONROE: Okay.

4 THE COURT: I'm going to have to go over and take a
5 look. I think that with the restrictions that have been placed
6 on us by these electronic tethers, I think I'm going to have to
7 have you at the podium -- or have both of you at that podium.
8 Because I also believe, after having spoken with Karen, the
9 layout we anticipate for the jurors is going to require that a
10 couple of jurors be seated in chairs in front of the gallery if
11 we have 14 there.

12 MR. MONROE: Okay.

13 THE COURT: Which would be approximately the place
14 where Mr. Lenhardt would like to have the podium.

15 MR. MONROE: Right.

16 THE COURT: So I think I'm going to -- I'll take a
17 look. I'd like to honor your request but I think I'm going to
18 need to tether you all to that podium.

19 MR. MONROE: Well, maybe there might be an
20 opportunity sometime in the next few days for Mr. Lenhardt and
21 I to go over and examine the area and see if we can familiarize
22 ourselves.

23 THE COURT: All right. Karen will do that with you.

24 MR. MONROE: That's good.

25 THE COURT: Okay.

1 MR. MONROE: Now, on a slightly different subject,
2 you did mention the possibility of jury questionnaires. I
3 submitted a proposed questionnaire and would -- if the court's
4 contemplating a questionnaire, I'd be pleased to meet with the
5 government to get some of their input because it's my view that
6 the questionnaire might help both sides in this case.

7 THE COURT: Well, I was uncomfortable, frankly, with
8 some of the questions that you asked.

9 MR. MONROE: Sure, yeah.

10 THE COURT: So I would ask that you sit down with
11 Mr. Lenhardt to see if you can come up with a mutually
12 agreeable questionnaire. In the alternative --

13 MR. MONROE: Okay.

14 THE COURT: -- I would give you a limited time
15 within which to ask questions during voir dire. I typically
16 don't allow lawyers to do that.

17 MR. MONROE: Yes, sir.

18 THE COURT: But given this case, I think it might be
19 warranted. You've tried enough cases in front of me, typically
20 I will ask questions that you all have submitted. In addition
21 to those that are set out in the judge's bench book, I'll set
22 out -- or I will ask the questions that I believe are relevant
23 that you've set out in requested voir dire and then I'll call
24 you up and ask if I've missed anything essential. But I'll
25 consider giving you both an opportunity to ask questions.

1 MR. MONROE: All right.

2 THE COURT: Typically, it would be either/or. I'm
3 not particularly wedded to jury questionnaires, but if you all
4 can come up with something mutually agreeable, I'll consider
5 it.

6 MR. MONROE: Well, I smiled, Your Honor, because I
7 recall I think another time that I imposed on you to do a
8 questionnaire and afterwards you expressed regret. That was a
9 -- it was a tax case. But --

10 THE COURT: Which case was that?

11 MR. MONROE: It was Howard Mitchell and Edna.

12 THE COURT: Oh, yes.

13 MR. MONROE: Skip Durbin and I tried that.

14 THE COURT: Oh, yes. I think the jury --

15 MR. MONROE: It was hung.

16 THE COURT: -- came up -- well, I think they came up
17 with the right decision.

18 MR. MONROE: Oh, yes, yes. Certainly with respect
19 to Mrs. Mitchell.

20 THE COURT: Yes.

21 MR. MONROE: And, you know, we worked it out. We
22 didn't have to retry the case on Mr. Mitchell. But that was a
23 case -- and anytime the Internal Revenue Service is bringing a
24 prosecution, there's going to be somebody that may have an
25 opinion, strong opinion, that they may not express in open

1 court as freely as they would on an answer to a questionnaire.

2 But back to the point, I would like an opportunity to
3 sit down with government counsel, see if we can come up with
4 something's that's acceptable to both sides to submit to Your
5 Honor for consideration.

6 And my concern is the publicity. It's the fifth trial,
7 you know. I purposely didn't -- I didn't -- in my attachment
8 to the motion for continuance, I didn't intend for you to have
9 to go digging through all the news articles that were linked
10 because that would have just been a nightmare to read all that.
11 I think the point I was trying to make is, there's a lot.
12 That's the point.

13 And so if we can do that and submit something to you by
14 mid week, would that be acceptable?

15 THE COURT: That would be fine. Mr. Lenhardt, what
16 are your thoughts here?

17 MR. LENHARDT: I concur.

18 THE COURT: Very good. Thank you.

19 Now, in terms of voir dire, what's the government's
20 position?

21 MR. LENHARDT: I think what you've set forth is
22 fine, Judge. You said you're not going to allow us too many
23 questions. We'll submit a couple for your consideration and
24 then we'll see how it goes from there.

25 THE COURT: All right. But I gave you alternatives

1 as to what I've allowed in the past. Like most federal judges,
2 I came from state court where it was anything goes and
3 sometimes it was really excessive in terms of attorney voir
4 dire. And so I've become more restrictive after 14 years of
5 this over in federal court, at least believing -- perhaps
6 wrongly -- but believing that court voir dire can ensure a fair
7 jury for both sides. I am persuaded, though, and I think the
8 Tenth Circuit case law suggests that allowing attorney voir
9 dire in a criminal case is helpful and the court can set
10 reasonable limits.

11 So my question to you then is, would you prefer that,
12 to have a limited time to ask questions; or in the alternative,
13 suggest to the court voir dire questions and have the court ask
14 them, and then give you an opportunity at the end of the
15 court's voir dire to point out questions that I did not ask and
16 plead with me to ask them?

17 MR. LENHARDT: I've done all the above in the past,
18 Judge. I honestly don't have a preference.

19 THE COURT: Okay. And so I take it, Mr. Monroe,
20 you'd prefer to have the opportunity to ask questions; correct?

21 MR. MONROE: Yes. I would like that briefly,
22 fifteen minutes or so, just more or less to introduce ourselves
23 to the jury.

24 But back on the questionnaire, I do note that today's
25 our deadline for filing proposed voir dire questions.

1 THE COURT: Uh-huh.

2 MR. MONROE: And I'd actually worked on that
3 somewhat over the weekend. But if there's going to be a
4 questionnaire, I can take a whole lot of that stuff out and
5 just ask you to submit proposed questions on some subjects that
6 are not going to be included in the jury questionnaire.

7 So, again, if we can get together, come up with what we
8 would submit as a joint questionnaire that it's acceptable to
9 you, then that could be given to the jurors before the actual
10 voir dire begins and it should shorten it.

11 THE COURT: We're going to have some difficulty in
12 timing because some of the panel will not come to us until
13 after Judge Eagan has released those individuals from jury
14 selection in the case that she's trying.

15 MR. MONROE: I see.

16 THE COURT: So there won't be very much time for
17 them to complete a jury questionnaire, and I would prefer to be
18 able to get started at 1:30, if at all possible.

19 MR. MONROE: Sure.

20 THE COURT: So keep it short.

21 MR. MONROE: Okay. Focused mainly on the publicity
22 aspects is what I would like.

23 THE COURT: Then, of course, we have to make
24 copies --

25 MR. MONROE: Right.

1 THE COURT: -- of all of those responses, which
2 takes time and I found that it really bogs down the process.
3 Then you all want the opportunity to review them all. And so
4 we're going to have about 50 people and that's going to take
5 time. So --

6 MR. MONROE: Your Honor, I understand your
7 frustration. I know it's cumbersome. But I think this case is
8 one -- because of the circumstances -- is one that a very
9 limited questionnaire will actually expedite the process.

10 I mean, the worst part from our perspective is you
11 start asking in open court questions about, what have you seen,
12 what have you heard, what have you read, and the more responses
13 we get from jurors is potentially going to contaminate the
14 panel. So if we can just focus the questionnaire primarily on
15 the publicity aspect, then we won't have to actually spend much
16 time speaking about that during the voir dire of the panel.

17 *(Discussion held off the record)*

18 THE COURT: Well, I foresee some problems. The jury
19 clerk is having some additional prospective jurors come in at
20 noon, and if we require them to fill out a questionnaire,
21 you're likely to have some jurors who will not have had the
22 opportunity to eat lunch, going to be cranky. So keep it
23 short, all right, because they need to be in my courtroom at
24 1:30.

25 I'm not going to give you much, if any, time to review

1 those questionnaires because you will be most interested in
2 those jurors who are called to the box. And so you can pull
3 out those questionnaires as we're going through them so they'll
4 be available to you, but you're not going to have an evening to
5 review the questionnaires and have some, you know, assistant
6 going through all 50 of them to determine your priority of
7 selection. So it's going to be a quick process.

8 MR. MONROE: We understand. We appreciate it. We
9 think this is a real critical part of the jury selection.

10 THE COURT: All right.

11 MR. MONROE: So --

12 THE COURT: What else?

13 MR. LENHARDT: Just one final recommendation from
14 the government, Your Honor --

15 THE COURT: Yes, sir.

16 MR. LENHARDT: -- and I won't have anything else.

17 When you have cases that have some amount of publicity
18 to them, what we often see on behalf of the government is
19 motions from the defense for either a change of venue or a
20 change of veneer. I know that hasn't happened in this
21 particular case. The government is not asking for those
22 things. However, I just want to make sure that the defendant
23 himself doesn't want a change of venue or venire. I think we
24 can sort of avoid potential problems down the road if we just
25 ask that question now.

1 THE COURT: All right. That's fine. Well, it would
2 be a little late. Mr. Monroe.

3 MR. MONROE: Your Honor, I have been practicing a
4 number of years, as Your Honor knows. I've had occasion,
5 mostly in state court proceedings, to file motions for change
6 of venue. My experience and then observations of others'
7 experience in state and federal court, the typical response is
8 that the court will conduct voir dire to determine whether or
9 not we can even select an impartial jury.

10 Now, the *Timothy McVay* case is the one that comes to
11 mind. That was taking place in the Western District in
12 Oklahoma City which was where that bombing took place. It
13 affected a whole lot of citizens in that community, and I can
14 see how the court had no choice but to grant a change-of-venue
15 motion.

16 But as I said, my experience has always been judges
17 like to take the opportunity to see if there can be an
18 impartial jury without a request.

19 THE COURT: Right.

20 MR. MONROE: And so that was the reason that I asked
21 for the questionnaire. I just didn't think a change of venue
22 would be necessary since the Northern District encompasses more
23 than just the city of Tulsa.

24 THE COURT: I think that's right. I do have some
25 questions here because you are much more familiar with the

1 facts than I, but I have a few questions, just background
2 questions, here.

3 Mr. Harper swabbed the gun and apparently at or about
4 the time the guilty plea was found. Was that swab the swab
5 that was used to test for DNA? Apparently, Harper didn't
6 request that the gun be tested for DNA at that time. But why
7 did he swab it?

8 MR. LENHARDT: So we have to -- I have to understand
9 which gun you're talking about because there was --

10 THE COURT: The trash-can gun.

11 MR. LENHARDT: Okay. I just wanted to make sure
12 which one you were talking about.

13 THE COURT: Yes, sir.

14 MR. LENHARDT: There was DNA testing done on that
15 swab and essentially there was nothing of value, I think is the
16 short version.

17 THE COURT: All right. So I was unclear as to
18 whether or not that swab was the swab used to test for DNA.

19 MR. LENHARDT: I hadn't anticipated this question so
20 I didn't dig into it, but from everything I know at the moment
21 that is my understanding, Your Honor.

22 THE COURT: All right. With respect to issues that
23 may be raised at trial, Mr. O'Carroll frequently characterized
24 Mr. Lake as a "sexual predator." We note that during the
25 fourth trial, Judge Holmes precluded the defense counsel for

1 the first time in the series of trials from referring to
2 Mr. Lake as a sexual predator, and part of her statement on the
3 record was that the sexual offenses didn't have anything to do
4 with whether Jeremy had a gun or that Jeremy was coming at
5 him with a gun so she wasn't going to let Mr. O'Carroll go
6 there.

7 I take it there's not going to be any sexual predator
8 issues here? Or I guess then the question is, what did the
9 defendant learn from his review of Mr. Lake's history that was
10 available to him as an officer?

11 **MR. LENHARDT:** Your Honor, from the beginning of my
12 involvement in this particular case, the one thing that I
13 wanted to do was to make sure that the defense was aware of
14 everything that I could find out. This was not a "play the
15 game as close to the vest as you can"; this was "be as open as
16 you humanly can." That was even before we ultimately
17 determined that we should seek indictment and the Grand Jury
18 indicted him.

19 So among the things that I did is actually try to
20 determine exactly what the defendant could learn about Jeremy
21 Lake to find out what is accurate and what is inaccurate. So I
22 had the folks at the Tulsa Police Department see exactly what
23 was available and what would have been available to the
24 defendant. I then put that person in the Grand Jury and I
25 turned that information over to the defense. So every police

1 report that's ever been generated as a result of Jeremy Lake
2 was turned over to the defense.

3 To call him a sexual predator in my mind was wholly
4 inaccurate. There was absolutely no indication in any of those
5 reports that he had sexually molested anyone else. There was
6 indications that he, himself, had been sexually molested. So
7 calling him a sexual predator was wholly inaccurate in my
8 opinion.

9 THE COURT: So these reports indicated that Lake had
10 been sexually molested?

11 MR. LENHARDT: Yes, sir. But not that he, himself,
12 was a person who had committed any of those types of acts. So
13 every one of those police reports that I found I turned over to
14 the defense, and I intend to put them into evidence at this
15 trial so that there is no dispute about what the allegations
16 against Mr. Lake were.

17 THE COURT: Okay. Just so I understand, though,
18 there were no previous charges of sexual predation?

19 MR. LENHARDT: Correct.

20 THE COURT: All right. There were accusations of
21 assault and battery; correct?

22 MR. LENHARDT: There was one report when Jeremy
23 Lake was approximately 16 years old. As indicated by both
24 sides, both at the previous trial and here in federal court,
25 Jeremy Lake was often raised by the system rather than by his

1 family. When Jeremy Lake was 16 years old, he was in a
2 juvenile facility, not because he had committed any crime, but
3 because he didn't have anyone to watch over him. On his
4 16th birthday, his family was supposed to come and pick him up.
5 They failed to show. It's not that they called and said they
6 couldn't make it; they failed to show.

7 Shortly thereafter, Jeremy Lake approached one of the
8 people who worked at the facility, pushed him, and said that he
9 wanted to punch him in the face. For that, Jeremy Lake was,
10 in fact, arrested and those charges were ultimately -- he was
11 not adjudicated delinquent of those charges.

12 **THE COURT:** So it wasn't pursued or he was found not
13 guilty of juvenile delinquency?

14 **MR. LENHARDT:** I'm not trying to give you any false
15 information. I believe that there was some sort of alternative
16 resolution, sort of a pretrial diverse-type resolution, but I
17 can't remember off the top of my head, Judge.

18 **THE COURT:** All right. What's this about
19 photographs of knives on his Facebook page? Is that going to
20 be an issue here?

21 **MR. LENHARDT:** So there were a photograph of a knife
22 on his Facebook page. That is one of the things that the
23 defendant could have accessed before he went to the scene. So
24 it does appear from the government's perspective that the
25 defense would be able to provide that in so I expect that it

1 will come in, Judge, and there will be no argument from the
2 government that it should not be.

3 THE COURT: All right. Apparently, Mr. Kepler
4 obtained information from DHS records after the shooting. I
5 take it those will not come in?

6 MR. LENHARDT: Defense counsel in the state charges,
7 Your Honor, had asked the court to issue an order allowing him
8 to access some of those things. I know that that was done. I
9 have no intention of bringing any of that out.

10 THE COURT: All right. Mr. Monroe, I mean, items
11 found from the DHS records after the shooting surely are not
12 pertinent here; correct?

13 MR. MONROE: Well, I'm not specifically aware of the
14 reference you're making. With respect to Mr. Kepler's search
15 of records while he was on duty earlier in the day and then
16 after he got home, those are certainly germane to what prompted
17 him to go to the scene in the first place.

18 THE COURT: Right. And the government, if I
19 understand correctly, says it's all coming in?

20 MR. MONROE: Well, but I wanted to revisit one
21 aspect of Mr. Lenhardt's comments.

22 THE COURT: All right.

23 MR. MONROE: Mr. Lake was investigated for an
24 alleged sexual offense against his younger brother, Michael.
25 That's what I think prompted the defense to refer to Mr. Lake

1 as a sexual predator. I've thought about this issue a lot and
2 I don't plan to go there. I don't plan to go there, but I
3 certainly plan to bring up the fact that Mr. Kepler had been --
4 and "charge" is really not the appropriate word in the juvenile
5 proceeding -- but had been named in a petition by the juvenile
6 authorities with respect to this assault and battery on an
7 employee of the -- I believe it was Shadow Mountain -- and that
8 would tend to show potential acts of violence. And then, of
9 course, you know, Mr. Lake carried that -- all the parties
10 agree Mr. Lake carried that knife with him just about
11 everywhere he went so that will be coming in.

12 But the sexual predator aspect, it's not -- it can't be
13 dismissed quite as easily as the government suggests because
14 there was a -- I don't want to say "charge" -- but there was an
15 investigation into whether or not there was some inappropriate
16 behavior toward his younger brother, Michael.

17 **THE COURT:** And that was valuable on NCIC to
18 Mr. Kepler before the shooting?

19 **MR. MONROE:** There's something called JOLTS,
20 J-O-L-T-S, and it's Juvenile Offender, something else,
21 something else. And if I had known Your Honor was going to be
22 inquiring, I would have brought that part of my file with me.
23 But I think the government will concede that on that JOLTS
24 record, there is a reference to this incident between Mr. Lake
25 and his younger brother at some point a couple years before the

1 incident.

2 So sexual predator, no. But with respect to a
3 concerned father who's wanting to rescue his daughter from a
4 potentially dangerous situation, if Mr. Kepler testifies, I
5 would think it might be appropriate for him to say, well, I saw
6 something that gave me something else besides the violence that
7 gave me some concerns.

8 THE COURT: Okay. So the two things, as I
9 understand it, are the A & B on the DHS or Shadow Mountain
10 worker.

11 MR. MONROE: Yes.

12 THE COURT: And the other is some reference to a
13 JOLTS record regarding an investigation of "lewd mol" of his
14 younger brother.

15 MR. MONROE: I don't remember if it's "lewd mol" --
16 I don't remember the exact particulars but it was of a sexual
17 nature, yes, Your Honor.

18 THE COURT: All right. Is that the government's
19 understanding?

20 MR. LENHARDT: Whatever records are admissible will
21 be put into evidence, Your Honor. So there's no dispute by
22 both sides that those can be admissible so I don't think
23 there's going to be a fight about that.

24 The only thing that you're referencing is, can either
25 side call him a "sexual predator," and it sounds like that's

1 not going to happen so I think this whole sort of whole issue
2 is moot.

3 THE COURT: Well, I was trying to get a concept of
4 what you all agree on as to what was available to Mr. Kepler;
5 in other words, what he had in his head as he was driving and
6 arrived at the scene. So there's no question he had access to
7 the JOLTS report and he had access to a report of aggravated
8 assault and battery of this DHS or Shadow Mountain worker.

9 MR. LENHARDT: Whatever he had access to will come
10 into court and there will be no objection from the government,
11 Your Honor.

12 THE COURT: Okay. Thank you so much.

13 All right. Will there be any attempted admission of
14 evidence as to Lisa Kepler's character, 404(a)?

15 MR. MONROE: I mean, is Your Honor asking about
16 criminal charges with her or --

17 THE COURT: Well, I was more interested in character
18 evidence. In the state court trial, as defense counsel argued,
19 Lisa Kepler had been "going out at 2:00 or 3:00 in the morning
20 and doing sex acts for drugs." There were motions filed before
21 the fourth trial with respect to a June 28, 2017, arrest of
22 Lisa Kepler by the Mannford Police Department for misdemeanor
23 possession of marijuana and possession of drug paraphernalia.
24 In any event --

25 MR. MONROE: Well, that last subject about her

1 arrest, I don't plan to open that up. I think it would have
2 been relevant in the state court proceeding because it happened
3 right around the time the trials were going on, and then the
4 question was, well, you know, was she under the influence at
5 the time she testified? But, no, I don't plan to -- I don't
6 plan to get into her arrest in Mannford.

7 I do think there's got to be some testimony -- and
8 probably Lisa Kepler will provide it -- that she was
9 misbehaving, I mean, off-the-charts kind of misbehaving,
10 sneaking out, bringing boys into the home in the middle of the
11 night, that sort of thing, which is what prompted her parents
12 to take her to the shelter and here we are. So I think some of
13 that evidence has to come in. But, again, based on
14 Ms. Kepler's testimony at the bond hearing, and I'm sure even
15 in her Grand Jury testimony that the government's provided me,
16 some of that evidence is there and she'll certainly testify
17 about those things.

18 THE COURT: All right. My understanding -- and,
19 frankly, I had enough to do here -- I wasn't on top of every
20 fact reported in the paper on those four trials.

21 MR. MONROE: Of course, sure.

22 THE COURT: But it was reported to me, perhaps
23 inaccurately, that Lisa Kepler's testimony has varied over the
24 trials.

25 MR. MONROE: It has. There have been some minor and

1 some not so minor inconsistencies. But I think she will be the
2 first to admit that she was using a lot of drugs, both around
3 the time of the subject incident and while those state trials
4 were going on. She's, at least for the most part, overcome a
5 lot of those challenges, had been in a sober-living situation
6 here recently, and is doing much better in terms of those
7 behaviors that were concerning to her parents back in 2014.

8 THE COURT: How old is she now?

9 MR. MONROE: She's 21 now? 24. Okay. Sorry. 24,
10 24.

11 THE COURT: And has children of her own?

12 MR. MONROE: Yes. She has a child, yes.

13 THE COURT: All right. Anything for the record?

14 MR. LENHARDT: I don't think it's necessary, Your
15 Honor. Mr. Monroe and I have already discussed what we believe
16 should be admissible, and so I don't think there's going to be
17 any fights in that regard.

18 *(Discussion held off the record)*

19 THE COURT: Just trying to make sure we've covered
20 everything. The defendant filed a motion to produce
21 exculpatory evidence under *Brady* and *Giglio* at docket No. 51.
22 Typically, the magistrate judges have been entering orders at
23 the outset of these cases requiring production of *Brady*. Was
24 that done here?

25 MR. MONROE: I don't have a specific memory of that,

1 Your Honor. I do know that we had -- we had a detention
2 hearing and I -- I just don't have a recollection. I mean, I
3 know they do it routinely. In just about every case I've had
4 this calendar year, the magistrates have entered the order. I
5 didn't look on the docket to see if it was done here.

6 THE COURT: I was just told it was done at docket
7 61. So to the extent that the defendant's asking for *Brady*
8 material, the motion's moot given the order at docket No. 61.

9 MR. MONROE: All right, sir.

10 THE COURT: And to the extent that we've addressed
11 *Giglio*, obviously that remains a continuing obligation. We've
12 addressed two potential witnesses here. But to the extent that
13 the defendant seeks impeachment material, of course, that
14 motion's granted.

15 Anything further?

16 MR. LENHARDT: No, sir.

17 MR. MONROE: Nothing from the defendant, no, Your
18 Honor.

19 THE COURT: All right. Thank you all very much.

20 MR. MONROE: Thank you.

21 THE COURT: We are in recess.

22 *(The proceedings were concluded)*
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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 29th day of May 2021.

s/ Brian P. Neil

*Brian P. Neil, RMR-CRR
United States Court Reporter*